

The Territorial Expansion of Frontex Operations to Third Countries: On the Recently Concluded Status Agreements in the Western Balkans and Beyond...

Florin Coman-Kund

2020-02-06T09:00:00

Since its inception, Frontex has been at the forefront of the Union's policy in the field of external border management. In the wake of the 2015 'migratory crisis', Frontex underwent a swift and unprecedented upgrade of its powers, resources, and capacities. The [2016](#) and [2019](#) mandate revisions arguably mark a '[quantum leap](#)' [gradually transforming Frontex into a more integrated and hierarchical administrative body](#). One of the most spectacular developments introduced by the recent reforms concerns the territorial extension of the agency's operations. Henceforth, Frontex is mandated to carry out operational activities, including executive powers, in third countries. This blog post first sketches out the agency's successive mandate expansions allowing for a broader geographic theatre of operations. It then examines the law currently governing the extraterritorial activities of Frontex, in particular the recently concluded status agreements with Western Balkan countries.

The salience of the agency's international dimension

The continuous recalibration of the agency's mandate is somehow symptomatic of the integration path towards a full-fledged European integrated border management (EIBM). International cooperation is [a key component of the EIBM](#), as the effective management of external borders and migratory challenges relies on cooperation with countries of origin, countries of transit, or neighbouring countries. The [original EIBM concept](#) acknowledged this through its four-tier access control premised upon measures in (neighbouring) third countries, and by emphasizing international cooperation as one of its core dimensions. It is therefore not surprising that international cooperation has been at the core of Frontex's successive mandate overhauls.

In general, Frontex's external relations activities revolve around [two interlinked axes](#), namely: (1) supporting cooperation between Member States and third countries; (2) implementing EU policies in the field of migration and border management. This job description also applies to the agency's geographically broadened operational remit.

The gradual expansion of Frontex's operations to the territory of third countries

Before 2016, Frontex could deploy liaison officers, launch technical assistance projects or, within the framework of working arrangements with competent authorities, carry out exchanges of information in third countries. But the agency was not allowed to conduct operational actions on the territory of third countries by deploying border guard teams in the context of joint operations.

[Regulation 2016/1624](#) fundamentally changed this. Through its Article 54(3), it enabled Frontex to conduct operations on the territory of neighbouring third countries. This in the context of coordinating operational cooperation between these countries and Member States requiring increased technical and operational assistance. What is more, the agency was enabled to send teams to third countries provided the following conditions were met: (1) an operational plan drafted jointly by the agency and the neighbouring country for each action; and (2) receiving the agreement of the bordering EU Member States(s); (3) according to Article 54(4), a status agreement based on Article 218 TFEU between the EU (not Frontex) and the concerned third country.

A closer look reveals a mismatch between Article 54(3) and Article 54(4). Article 54(3) specifically envisaged operational activities in a *neighbouring* third country in the context of actions at the EU external borders with that country. Yet Article 54(4) foresaw arguably a broader use of status agreements: when teams are deployed in *third countries* (without specifying that it had to be neighbouring). The Commission's 2016 [model status agreement](#) based on Article 54(5) did not do much to clarify this. The [2019 Frontex Regulation](#), however, explicitly allows the agency to henceforth carry out operations on the territory of *any third country* (Article 74). The scope of status agreements was even extended to the establishment of Frontex antenna offices in third countries, as operational structures intended to facilitate coordination of operational cooperation.

From theory to practice: status agreements with Western Balkan countries

But let's return to 2016. Article 54(4) stipulated that status agreements should deal with 'all aspects (...) necessary for carrying out the actions' in particular the scope of operations, the tasks and powers of the team members, civil and criminal liability issues, and fundamental rights safeguards. The Commission's model status agreement was more detailed as it covered the types of operations to be carried out in third countries, the operational plan, the conditions for exercising executive powers including use of force, privileges and immunities of team members, suspension/termination of operations, and dispute settlement. Hence, Frontex status agreements look quite like the [status of forces agreements \(SOFAs\) and status of mission agreements \(SOMAs\) the EU concludes in the context of its military operations and civilian missions in third countries](#). Interestingly, the Commission

extended the scope of status agreements to include return operations from Member States to the respective third country. Such operations went arguably beyond the scope of Article 54(3) as they do not take place per se at the border between a Member State and a neighbouring third country, nor do they require an operational plan.

In line with the [Union's cooperation strategy](#) with Western Balkan countries, status agreements were initialled with five countries, namely Albania, North Macedonia, Serbia, Bosnia and Herzegovina, and Montenegro between 2018–2019. [So far](#), three status agreements have been concluded ([Albania](#), [Montenegro](#), and [Serbia](#)), while the remaining two (with North Macedonia and Bosnia and Herzegovina) are pending signature. The status agreement with Albania was the first (and so far the only one) to enter into force on 1 May 2019, with [the first Frontex coordinated joint operation on the territory of a third country ever](#) being launched on 21 May 2019 at the Albanian border with Greece.

The Frontex status agreements concluded so far follow closely the Commission's model agreement. Next to joint operations and rapid border interventions in the context of operational cooperation at the external borders, they also cover return operations to that country. The status agreements follow the rather minimalist approach to the operational plan in the Commission's model agreement, as they, in contrast to the Frontex Regulation, do not explicitly include some important aspects among the mandatory elements of the plan (e.g. duration of the operation, its geographical area, immediate incident reporting procedures).

The extraterritorial exercise of executive powers and use of force

One of the most sensitive aspects dealt with in the status agreements concerns the exercise of executive powers, including the use of force by team members. Interestingly, only the agreement with Albania provides a definition of executive powers as 'the powers necessary to perform the tasks required for border control and return operations which are conducted (...) during a joint action as included in the operational plan' (Article 2(12)). From the [press release](#) announcing the first Frontex-led joint operation in Albania, it transpires that such executive powers may pertain, for instance, to performing border checks at crossing points and preventing unauthorized entries. All other agreements contain a rather vague horizontal provision stipulating that all team members are authorized to 'perform the tasks and exercise the executive powers required for border control and return operations'. It would therefore be judicious that the tasks and executive powers of team members will be clearly and exhaustively defined in the operational plan of each action. The general principles governing the exercise of powers by the members of the teams entail (1) respecting the laws of the third country, and (2) acting under the instructions and in the presence of third country competent staff. Exceptionally, the competent third country authority may authorize team members to act on its behalf.

Force may be used only with the consent of the home Member State and the third country, in the presence of third country competent staff, and in accordance with its relevant legislation. Also here is possible to deviate from the general rule, as team members may be authorized to use force in the absence of third country competent staff; however, none of the agreements provides for further conditions, limitations, or procedural details regarding this derogation.

Another important operational tool at the disposal of Frontex-led teams consists of the possibility to gain access to (personal) data in the national databases of the third country. Accessing such data is allowed if (1) it is necessary for fulfilling operational aims and (2) it is limited to what is necessary for performing team members' tasks and executive powers. These two conditions should be clearly specified in the operational plan to prevent that they are interpreted too broadly in practice.

As a corollary to the exercise of executive powers and the potential use of force, all agreements include rather detailed provisions regarding the privileges and immunities of the members of the teams, largely duplicating the standard rules in EU SOFAs/SOMAs (see [here](#) an example). Two aspects are worth attention here. First, in line with the standard EU SOFA/SOMA models, the agreements with Albania and Serbia ensure team members cannot be obliged to give evidence as a witness before the competent authority of the third country. By contrast, under the agreement with Montenegro team members can be obliged under certain conditions to provide evidence according to national procedural law. Second, the possibility to waive immunity and to subject a team member to another jurisdiction does not seem to cover Frontex's own statutory staff. This arguably creates a liability gap with regard to the agency's own operational staff arguably contravening the requirement in the Frontex Regulation that the status agreement covers the civil and criminal liability of the members of the teams.

Too much unchecked power? Data processing and fundamental rights protection

Given the wide-ranging powers and tasks that the team members may perform in third countries, it is not surprising that all Frontex status agreements include provisions regarding fundamental rights and data processing. Indeed, all agreements impose on each party to make available a complaint mechanism for alleged breaches of fundamental rights during operations. Yet, no additional safeguards are included regarding minimum access conditions, information duties, impartiality, or redress. In all agreements the scope of data processing is broadly defined as whenever necessary for the implementation of the status agreement. On the EU side, the processing of personal data is subject to the EU relevant legal framework, in particular the [GDPR](#) and [Directive 2016/680](#), for participating Member States, and [Regulation 2018/1725](#) supplemented by Frontex measures (yet to be adopted) for agency staff. In case of transfers of personal data to the third country, the agency and the Member States are required to indicate restrictions on access and use, including onward transfers. A data processing report must be prepared by the parties

at the end of each action and forwarded to the Frontex fundamental rights officer and data protection officer.

To guarantee their conformity with the constitutional rules of the Union, the status agreements should closely follow Frontex's legal framework and should entail adequate safeguards to preserve EU fundamental values. Therefore, agreements should have included an explicit prohibition on onward transfers of personal data to third countries or provide for reasonable data retention periods. Moreover, the scarcity of provisions regarding data subject rights and effective legal remedies suggests that these agreements might fall short of providing appropriate safeguards regarding protection of fundamental rights at EU standards.

It is therefore a positive sign that Article 73(3) of the new regulation multiplies fundamental rights and data protection guarantees by imposing that future status agreements include 'practical measures related to the respect for fundamental rights' and a complaints mechanism. Further, the European Data Protection Supervisor (EDPS) must be consulted on the provisions related to data transfers where they 'differ substantially' from the Commission's model agreement. In view of the extended (including also EUROSUR) and potentially intrusive data processing taking place under the status agreements, the consultation of the EDPS is welcome, though it might be problematic to establish a substantial difference from the model agreement. Finally, Article 76(1) of Regulation 2019/1896 subjects the Commission to an extensive consultation duty (Member States; Frontex; Fundamental Rights Agency, EDPS) before adopting the template for new status agreement. Yet, it is not clear whether the Commission is bound by any procedural obligations (e.g. explain why advice is not followed) during the consultation process.

Outlook on the future of Frontex status agreements

Frontex status agreements have a short and rather inconclusive past, but they definitely have a future. The agreements with Western Balkan countries inaugurate a new stage of the EIBM through the territorial extension of Frontex-coordinated operations to third country territories. However, this revolutionary development comes with fundamental questions and challenges as already illustrated by the current practice.

Regulation 2019/1896 extends the scope of status agreements and brings fine-tunings that already require amendments to the existing Commission's model agreement and status agreements. It arguably contributes to bringing the legal framework of the extraterritorial activities of Frontex closer to EU law and fundamental rights standards. In any case, the most recent Frontex mandate revision will likely lead to more status agreements being concluded with third countries. One recurring concern with respect to the operational cooperation in third countries based on current and future status agreements is to ensure the required consistency with EU law and fundamental rights standards.